

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

PETER SCHENA,
Appellant

v.

Docket No. G2-05-270

CITY OF HAVERHILL,
HUMAN RESOURCES DIVISION,
Respondents

Appellant's Representative:

Susann Pothier, Esq.
Pothier Law Offices
86 Summer Street
Haverhill, MA 01830

Respondent's Representative:

William D. Cox, Jr.
City Solicitor, City of Haverhill
145 South Main Street
Bradford, MA 01835

Commissioner:

John E. Taylor

DECISION ON RESPONDENTS' MOTION TO DISMISS

Procedural Background

The Appellant, Peter Schena, (hereafter "Appellant" or "Schena") filed this appeal with the Civil Service Commission on July 23, 2005 claiming that his rights as a candidate on the promotional list following the 2001 Fire Lieutenant examination have been prejudiced by the Respondents, City of Haverhill (the "City"), as Appointing

Authority, and the Human Resources Division (“Human Resources” or “HRD”), failure to act. Several promotional appointments were made to Permanent Fire Lieutenant but the Appellants name was not reached on the certification list. Following a pre-hearing conference held at the offices of the Civil Service Commission on November 30, 2005, the Commissioner directed the Appellant to file an Amended Appeal after he had obtained pertinent information from the City and Human Resources. On December 6, 2005, the Appellant requested information from the Respondents. On January 23, 2006, the Appellant filed an amended appeal as well as a motion for permanent appointment and a motion to compel the Respondents’ production of the Appellant’s requested information. In his amended appeal, the Appellant requested that the Commission revive the departmental promotional eligible list for Fire Lieutenant, established as a result of the November 2001 examination, to permit his permanent appointment and approve credit for time in - grade for one year retroactive from January 1, 2004. On February 21, 2006, the City submitted a motion to dismiss for lack of jurisdiction. On February 28, 2006, the Appellant submitted an opposition to the Respondent’s motion.

Factual Background

In 1996, the Appellant began his employment with the City as a Private Firefighter in the Fire Department. On November 17, 2001, the Appellant took and passed the Promotional Fire Lieutenant Examination. On March 7, 2004, the City appointed the Appellant to Acting Fire Lieutenant. A short time later, the City requested from the HRD a certification list for one temporary Fire Lieutenant, and HRD issued Certification List a No. 240408, dated May 3, 2004. Three names were listed, with the

Appellant's name in second position. As the Appellant was the only applicant to indicate his acceptance of the position, the Appointing Authority appointed him to temporary Fire Lieutenant. The position of temporary Fire Lieutenant was necessitated by the appointment of a provisional Fire Chief and the temporary promotions that resulted in the positions below Fire Chief, namely Deputy Chief and Captain.

Respondent's Grounds for Dismissal

The Respondents ask the Commission to dismiss the Appellant's appeal as he has not provided any allegation of any decision, action or failure to act on the part of the administrator which would provide a basis for his appeal. The Respondents contend that the present appeal does not fall within the jurisdiction of the Commission.

The Commission may dismiss a matter on the motion of a party for, among other circumstances the "lack of jurisdiction to decide the matter." 801 CMR 1.01 (7) (g) (3). In the present case, a review of the eligibility list in effect for all relevant times when prior appointments were made by the Appointing Authority indicates that at no time was the Appellant ranked higher than the other candidates who were selected for permanent appointment as Fire Lieutenant. Further, the eligibility list expired on May 13, 2004. Finally, the Appellant's case does not involve a bypass. Rather, the Appellant was tied with one candidate who was selected ahead of him. When the Appointing Authority selects between candidates whose scores are tied, it need not submit a statement of reasons to Human Resources, they need not approve the selection and the Commission is without jurisdiction to hear an appeal with regard to the appointment.

The Appellant also asserts that the Respondents violated civil service law, citing James Silvia v Department of Correction and Department of Personnel Administration, 9 MCSR 2 (1996) and G.L.c.31, §8, regarding Temporary Appointments. However, examinations of both the case and Statute referred to do not indicate a violation. Specifically, the Appellant's situation is distinguishable from that of the Appellant in Silvia as that case concerned employees being held in temporary positions while other employees were promoted to permanent positions. However, at the time of his appeal, Schena continued in a temporary position and no further appointments had been made by the Respondent that would provide a basis for appeal.

Conclusion

Based on the above, the Appellant has not been bypassed therefore the Commission does not have jurisdiction in the matter.

Respondents' Motion to Dismiss is allowed and the Appellant's appeal filed under Docket G2-05-270 is hereby *dismissed*.

Civil Service Commission

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Marquis, Henderson and Taylor Commissioners) [Guerin abstained] on August 8, 2007.

A true copy. Attest:

Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Susann Pothier, Esq.
William D. Cox, Jr.